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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN MANUEL CORDERO, JR.,

Defendant and Appellant.

F057776

(Super. Ct. No. F09900171)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. James M. Petrucelli, Judge.

Kelly Babineau, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French and Tia M. Coronado, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Hill, J., and Kane, J.

On April 14, 2009, a jury convicted appellant, Ruben Manuel Cordero, Jr., of misdemeanor battery. (Pen. Code, § 242.) After Cordero waived time for sentencing, the court placed him on conditional probation for three years and ordered him to serve 180 days local time.

On appeal, Cordero contends that one of the conditions of his probation is constitutionally vague and violates the due process clause of the Fourteenth Amendment. We agree the condition at issue is vague and we will strike it. In all other respects, we will affirm.

FACTS

On January 4, 2009, Cordero punched his roommate, Lavonna Tomlinson, during an argument over Cordero's dogs. The following day, Cordero sent several threatening text messages to Tomlinson. Tomlinson also reported that Cordero attempted to stab her with a knife.

On April 14, 2009, a jury acquitted Cordero on several felony charges and convicted him on a single count of misdemeanor battery. As a condition of probation, the court ordered Cordero not to "have any new arrests based on probable cause."

DISCUSSION

Cordero contends the probation condition prohibiting him from "having any new arrests based on probable cause" is constitutionally vague because it does not give him "adequate notice" of what conduct it prohibits him from engaging in. We agree.

"While [a trial] court does have broad discretion to impose probation conditions which foster rehabilitation and protect the public, this discretion must be exercised in a reasonable manner and is limited by certain constitutional safeguards. [Citations.] "The discretion granted is not boundless. In the first place, the authority is wholly statutory; the statute [Pen. Code, § 1203.1] furnishes and limits the measure of authority which the court may thus exercise [citations]." [Citation.]'" (*People v. Hodgkin* (1987) 194 Cal.App.3d 795, 802.)

“The concept of unconstitutional vagueness is related to the concept of unconstitutional overbreadth, but ‘there are important differences.’ [Citation.] “A clear and precise enactment may nevertheless be ‘overbroad’ if in its reach it prohibits constitutionally protected conduct.” [Citation.] The underlying concern of the vagueness doctrine is the core due process requirement of adequate notice:

““No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” [Citations.] The operative corollary is that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” [Citation.]

“... Thus, a law that is “void for vagueness” not only fails to provide adequate notice to those who must observe its strictures, but also “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” [Citation.]’ [Citation.]

“A probation condition is subject to the ‘void for vagueness’ doctrine, and thus ‘must be sufficiently precise for the probationer to know what is required of him’ [Citations.]” (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630, italics omitted.)

Cordero would surely know that some circumstances would likely result in his arrest for probable cause. For example, he undoubtedly would know that taking merchandise from a store without paying for it would provide a police officer with probable cause to arrest him for theft. However, “[p]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts’ [Citation.] It is incapable of precise definition. [Citation.] “The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,” and that belief must be ‘particularized with respect to the person to be ... seized.’ [Citation.]” [Citation.]’ [Citation.] ““[S]ufficient probability, not certainty, is the touchstone of

reasonableness under the Fourth Amendment.”’ [Citation.]’ [Citation.] ...” (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1044.)

Given the nebulous nature of probable cause, it is impossible for Cordero to know the innumerable, myriad of circumstances which, in combination with his conduct, might cause a police officer to believe he had probable cause to arrest him. Thus, the probation condition at issue is vague because it is not sufficiently precise to let Cordero know what is required of him to comply with it.

Respondent contends the condition at issue is not vague because it clearly informs Cordero that he should not suffer any more arrests. However, knowing that he should not suffer any arrests does not eliminate the constitutional issue discussed above.¹

DISPOSITION

The judgment is modified to strike the probation condition prohibiting Cordero from having any arrests with probable cause and the trial court is directed to correct its paperwork accordingly. As modified, the judgment is affirmed.

¹ In view of our conclusion that the probation condition at issue is vague, we will not discuss Cordero’s contention that it violated his right to due process by lowering the prosecutor’s burden of proof. Nevertheless, we note that probable cause to arrest is not always based in part on the arrestee’s conduct. For example, “When the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.” (*People v. Hill* (1968) 69 Cal.2d 550, 553.) Thus, the condition at issue is also objectionable because it could result in Cordero violating his probation even if he got arrested and the probable cause to arrest was not based on his willful conduct. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982 [in order for probation to be revoked “evidence must support a conclusion the probationer’s conduct constituted a willful violation of the terms and conditions of probation”].)